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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 47

UNITED STATES OF AMERICA, APPELLANT

v.

ANTHONY L. FABRIZIO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the district court dismissing the indictment (R. 10) is not reported.

JURISDICTION

The order of the district court was entered on October 5, 1965 (R. 10). The notice of appeal was filed on November 4, 1965 (R. 11–12), and this Court noted probable jurisdiction on February 21, 1966 (R. 13; 383 U.S. 904). The jurisdiction of this Court rests on 18 U.S.C. 3731.

STATUTE INVOLVED

18 U.S.C. 1953 provides as follows:

> § 1953. Interstate transportation of wagering paraphernalia
>
> (a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.
>
> (b) This section shall not apply to (1) pari mutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication. * * *

QUESTION PRESENTED

Whether an indictment alleging the knowing interstate carriage of acknowledgements of purchase to be used, and adapted, devised and designed for use, in a

New Hampshire lottery charges an offense under 18 U.S.C. 1953.

STATEMENT

On September 3, 1964, an indictment was returned in the United States District Court for the Western District of New York alleging that appellee knowingly carried in interstate commerce from New Hampshire to New York "records, papers and writings, to wit: 75 acknowledgments of purchase for a sweepstakes race of the State of New Hampshire, to be used, and adapted, devised and designed for use, in a wagering pool with respect to a sporting event, that is: a sweepstake race of the State of New Hampshire * * *" (R. 3). On September 24, 1964, in response to a motion by appellee, the United States filed a bill of particulars, stating that "[i]t is not charged by the United States that the defendant violated any State law, ordinances or rules. The United States charges that the defendant violated § 1953, Title 18, United States Code" (R. 5).

On October 12, 1964, appellee moved to dismiss the indictment on the ground that the indictment and bill of particulars did not state facts sufficient to constitute an offense (R. 4). The grounds for the motion were set forth in a supporting affidavit of one of his attorneys (R. 6–9). While admitting that appellee carried the sweepstakes acknowledgments, as charged, the affidavit argued that appellee's conduct did not fall within the purview of the statute. The affidavit alleged that the purpose of the law was, as set forth in its title, " 'to provide means for the Federal Gov-

ernment to combat interstate crime and to assist the state [sic] in the enforcement of their criminal laws by prohibiting the interstate transportation of wagering paraphernalia,'" and that the legislative history revealed an intent "to provide the Federal Government with another tool to combat forces of organized crime" (R. 7). It further alleged that appellee was not connected with organized crime or part of a lottery enterprise; that he had not violated any State law; that the State of New Hampshire had established its lottery after enactment of Section 1953; and that the acknowledgments which he carried were not wagering paraphernalia because New Hampshire retains custody of its lottery tickets and does not require presentation of the acknowledgment for payment of the prize.

On October 5, 1965, the district court dismissed the indictment. Citing House Report No. 968, 87th Cong., 1st Sess., the court stated only that "[t]he charge in the indictment does not come within the purpose of Section 1953 of Title 18, United States Code, as disclosed in the legislative history of the Act" (R. 10).

SUMMARY OF ARGUMENT

The present indictment—closely paralleling the statutory language—charges an offense under 18 U.S.C. 1953. The language of the statute clearly proscribes the conduct outlined in the indictment, and an examination of the structure and background of the Act demonstrates that the statute means exactly what its plain words convey.

The Act contains no exemption for legal or State-sponsored lotteries. On the contrary, its careful pattern of exemptions—for parimutuel material, newspapers, and the transportation of certain sports betting material *into* a State where such betting is legal—precludes the creation, by interpretation, of a further exemption for the transportation of non-parimutuel material, not for use in wagering on a sporting event, *from* a State where the material is legal. Indeed, such an added exemption would frustrate the Act's purposes; like the earlier federal anti-lottery laws with which it must be considered, this statute was designed to prevent one State's legal gambling from undermining the anti-gambling policies of the majority of States. Congress, well aware of the scope of the statute, plainly proposed to cover legal as well as illegal lotteries.

Nor is the Act limited to persons connected with organized crime or a lottery enterprise. The inclusion of such an exemption in the Act would have created grave practical and constitutional problems. That such an exemption was not intended is underscored by the limitation of a companion measure to persons "engaged in the business of wagering" and the exceptions for newspapers and parimutuel betting in Section 1953 itself. While Congress may have been primarily motivated by a desire to combat organized crime, this was not its only goal.

Finally, it is clear that the acknowledgements of purchase carried by appellee are not, as a matter of law, excluded from the Act. The deliberate breadth

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of the statutory language—designed to obviate restrictive judicial interpretations—indicates that any paper which has a use in a lottery operation and facilitates wagering is included. Whether the particular acknowledgements had such a use in this case, as charged, is a question for the trier of fact. The government expects to prove that the acknowledgements were used to enable persons who remained in New York, where lotteries are illegal, to participate in the sweepstakes through the agency of appellee, who was engaged in the business of purchasing the tickets for a fee. To exclude such acknowledgements as a matter of law would impair Congress' effort to close the channels of interstate commerce to wagering material and to prevent interference with State anti-gambling policies.

ARGUMENT

AN INDICTMENT ALLEGING THE KNOWING INTERSTATE TRANSPORTATION OF ACKNOWLEDGEMENTS OF PURCHASE TO BE USED, AND ADAPTED, DEVISED AND DESIGNED FOR USE, IN A NEW HAMPSHIRE LOTTERY CHARGES AN OFFENSE UNDER 18 U.S.C. 1953

Section 1953 (*supra*, p. 2) is a comprehensive measure specifically "designed to prevent the easy interstate transportation of wagering paraphernalia." H. Rep. No. 968, 87th Cong., 1st Sess., p. 2. It prohibits anyone "except a common carrier in the usual course of its business" from knowingly carrying in interstate commerce "any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wag-

ering pools with respect to a sporting event; or (c) in a numbers * * * or similar game * * *." The exemptions from this prohibition are narrow and explicit; the Act does not apply to carriage of legally acquired parimutuel tickets, legally used parimutuel material and equipment, material to be used in betting on a sporting event transported into a State where such betting is legal, or newspapers. The present indictment, tracking the statutory language, charges appellee with knowingly carrying "records, papers and writings * * * to be used, and adapted, devised and designed for use, in a wagering pool with respect to a sporting event," specifically "acknowledgements of purchase for a sweepstakes race of the State of New Hampshire" (R. 3). The charge falls squarely within the range of the Act's prohibitions and there is nothing to bring it within any of the narrow statutory exemptions. Nor is there anything in the legislative history which would warrant a departure from the Act's plain terms.[1]

[1] The committee report relied on by the court below makes clear that the purpose of the Act is fully disclosed by the statutory language. Under the caption "Purpose of the bill", the report notes (H. Rep. No. 968, 87th Cong., 1st Sess., p. 2):

"The purpose of the bill, as amended, is to prohibit * * * the transportation in interstate or foreign commerce, except by common carrier in the usual course of its business, of any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game."

A. THE STATUTE APPLIES TO LEGAL AS WELL AS ILLEGAL LOTTERIES

The district court's decision may have been based on the view that, since the lottery in question was legal in New Hampshire, Section 1953 does not apply. Such an interpretation, however, would virtually nullify the Act since it would allow the carriage of wagering paraphernalia from the few places where wagering is legal[2] to any other place in the country. And both the language and the history of the Act preclude this construction.

The statute contains no express exemption for legal lotteries, and it is obvious that none was intended. Subsection (b)(1) carves out an exception for material related to legal parimutuel betting, and (b)(2) permits material used in betting on sporting events to be transported "*into* a State in which such betting is legal under the statutes of the State" (emphasis supplied). This deliberate pattern of exemptions surely forbids the interpolation of an additional exemption—plainly not provided in the Act—for transportation of non-parimutuel wagering material, not for use in betting on sporting events, *from* a State in which such wagering is legal. See *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 216–217; *United States* v. *Borden Co.,* 308 U.S. 188, 201.

The reason for the distinctions carefully drawn in the Act is clear: If betting material was freely transportable from States where it was legal to those where

[2] See, *e.g.*, Nev. Rev. Stat. §463.160 (horse race books and sports pools).

it was illegal, the public policy of the latter States would be undermined.[3] While Congress left any State free to legalize gambling within its borders, it sought to ensure that, in so doing, that State would not interfere with the policies of the other States, the majority of which do not permit gambling. See *Minter* v. *Federal Trade Commission*, 102 F. 2d 69, 73 (C.A. 3); 108 Cong. Rec. 9266. Accordingly, betting material relating to a sporting event may be brought into a State where such betting is permitted by statute,[4] but it may not be brought into any other State. And since there is little room for trafficking in parimutuel tickets,[5] these may be transported out of State if legally acquired. But other betting material, such as

[3] It is interesting to note that approximately 87% of the winners in the 1964 New Hampshire Sweepstakes resided out of State. See 110 Cong. Rec. A5494. Winners were from 37 States, the District of Columbia, the Canal Zone, Canada and Ireland. Winners of the 1965 sweepstakes were from 35 States, the District of Columbia, Canada, Germany and the Philippines. See New Hampshire Sweepstakes Commission, *New Hampshire Sweepstakes Program* 9 (1965).

[4] Note that the exemption for transportation of betting material into States where betting is legal is strictly limited to "materials to be used in the placing of bets or wagers on a sporting event." Thus it has been held that lottery material is not within the exemption of subsection (b)(2). *United States* v. *Baker*, Nos. 15572 and 15573, C.A. 3, decided July 28, 1966, involving a lottery legal under the laws of Haiti.

[5] Parimutuel bets can only be placed at a race track, and the winning tickets can only be redeemed at the same track. Ordinarily, the race is run a short time after the bet is placed. See *Opinion of the Justices*, 249 Ala. 516, 517, 31 So. 2d 753, 754.

the papers involved here, may not be carried in interstate commerce, no matter how they were acquired.

The immateriality of the fact that a lottery may be legal in the State where it is conducted is made even more apparent upon examination of the other federal anti-lottery statutes, in the context of which Section 1953 must be considered. Although early federal laws forbade only the mailing of matter "concerning illegal lotteries" (15 Stat. 196; 17 Stat. 302; Rev. Stat. 3894), Congress eliminated the word "illegal" in 1876. Act of July 12, 1876, 19 Stat. 90; see *Horner* v. *United States*, 147 U.S. 449, 466. This was designedly done to prohibit one State from interfering with the policy of another. As Senator Morrill pointed out in the debate on the 1876 measure (4 Cong. Rec. 4262):

> * * * [I]t is obvious that if thirty-six States were to make the most penal statutes against lotteries, and the mails were open to one that allowed lotteries, the laws of the thirty-six States would be rendered nugatory, because all the people of the thirty-six States could obtain their tickets from this one State as well as though they were authorized from the whole. Therefore if the matter is allowed to run through the mails, any laws by any State against lottery tickets are entirely valueless.

In 1895, Congress supplemented this provision with an act prohibiting the transportation and importation of lottery tickets. 28 Stat. 963; see *Lottery Case*, 188 U.S. 321, 354. Since that time, there has been no serious doubt that the anti-lottery statutes (now 18 U.S.C. 1301–1305) embrace all lotteries, even if

authorized or sponsored by a State.[6] In addition to other legal or illegal lottery material, Section 1302 now specifically prohibits the mailing of "[a]ny article described in section 1953 * * *." Act of Sept. 13, 1961, 75 Stat. 492 (the same statute which added 18 U.S.C. 1953). It cannot be assumed that Congress intended the new part of section 1302 to apply only to illegal lotteries while the older parts apply to legal or illegal lotteries. In the light of this close relationship between the Act in question and the older anti-lottery statutes, it would be anomalous for the courts to superimpose an exception for legal lotteries, not present in the older statutes, on Section 1953. The latter enactment was designed to fortify the earlier prohibitions.

Congress was unmistakably aware of the scope of the earlier anti-lottery acts when it enacted Section 1953,[7] and it understood that the new legislation, like the old, would apply to legal as well as illegal lotteries.[8] The bill which ultimately became Section

[6] Several States had legal lotteries in 1876. See 4 Cong. Rec. 4262. In at least two, Louisiana and Kentucky, lotteries were operated under State auspices, contributing part of their receipts to State or local treasuries. See Spofford, *Lotteries in American History* in American Historical Ass'n, Annual Report for 1892, S. Misc. Doc. No. 57, 52d Cong., 2d Sess., pp. 173, 190; *Douglas* v. *Kentucky*, 168 U.S. 488. See also *Stone* v. *Mississippi*, 101 U.S. 814. Congress has never distinguished between lotteries authorized by a State and those sponsored by a State, and there is no room for such a distinction in the construction of Section 1953.

[7] See, *e.g.*, Hearings on H.R. 468 before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess., p. 344 (remarks of Assistant Attorney General Miller.)

[8] See Hearings on S. 1653 before the Senate Committee on the Judiciary, 87th Cong., 1st Sess., p. 294:

"Senator KEFAUVER. Mr. Miller, does not all of this book-

1953 (S. 1657, 87th Cong., 1st Sess.) was one of a series of antigambling bills sponsored by the Department of Justice.[9] The title of the bill was substantially the same as that of the final enactment: "A bill to provide means for the Federal Government to combat interstate crime and to assist the States in the enforcement of their criminal laws by prohibiting the interstate transportation of wagering paraphernalia." And the text of the bill, which contained no exceptions, was identical to the text of present Section 1953 (a). In the extensive hearings held in both houses of Congress, both supporters and critics of the measure pointed out its comprehensive scope. See, *e.g.*, House Hearings, pp. 30, 50, 57; Senate Hearings, p. 293. See also *United States* v. *Kelly*, 328 F. 2d 227, 230–231 (C.A. 6). It was made clear, for example, that the statute covered papers related to a sweepstakes—including those conducted with governmental approval, such as the Irish Sweepstakes. House Hearings, p. 352 (testimony of Assistant Attorney General Miller).

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making, wagering pool, and so forth mean where it is not legal by State law?

"Mr. MILLER. No, sir.

"That proviso is not in here. It was the position of the Department that these types of paraphernalia, records, and other devices should be barred from interstate commerce."

[9] Among the bills in this program were (1) S. 1653 (similar to H.R. 6572), a bill prohibiting travel or transportation in aid of racketeering enterprises, enacted into law as 18 U.S.C. 1952; (2) S. 1656 (similar to H.R. 7039), a bill prohibiting the use of wire communication facilities for the transmission in commerce of wagers or information assisting wagering, enacted into law as 18 U.S.C. 1084; and (3) S. 1658, a bill amending the act prohibiting the transportation of gambling devices in commerce.

Out of concern that the breadth of the statute might interfere with freedom of the press, and in deference to State laws permitting betting on sporting events, the Senate created the specific exemptions contained in subsection (b),[10] preserving, at the same time, the bill's comprehensive prohibitions where newspapers and legal betting on sports are not involved. See S. Rep. No. 589, 87th Cong., 1st Sess., pp. 2–3. The House adopted the Senate version in substance, noting that the purpose of the bill was to extend the long-established prohibition against interstate transportation of lottery tickets to all gambling papers adapted for use in connection with a lottery or sporting event. See H. Rep. No. 968, 87th Cong., 1st Sess., p. 2. In none of the deliberations on the statute was it ever suggested that the Act would not apply to legal lotteries. On the contrary, it was fully understood that the statute would have the scope indicated by its unambiguous language and would forbid the interstate carriage of papers designed for use in *any* "wagering pools with respct to a sporting event."

In its *amicus* brief filed in response to the jurisdictional statement, the State of New Hampshire contended that its sweepstakes embodied peculiar attributes which, as a matter of law, exempted it from the coverage of Section 1953. As we have shown, this is not the case. Congress could, of course, create a special exemption from Section 1953 for papers re-

[10] Subsections (b)(1) and (b)(3) were first adopted in the Judiciary Committee. Subsection (b)(2) was offered as an amendment on behalf of the Committee by its chairman on the floor of the Senate. See 107 Cong. Rec. 13902.

lating to the New Hampshire Sweepstakes, similar to the exemption from the federal wagering tax enacted in 1965. Act of June 21, 1965, 79 Stat. 170; 26 U.S.C. 4402(3) (Supp. I, 1965).[11] Although several bills have been introduced in recent years which would exempt State-operated lotteries from the prohibitions of 18 U.S.C. 1301–1304 (H.R. 6716, H.R. 7856, 88th Cong., 1st Sess.; H.R. 1106, 89th Cong., 1st Sess.), none has been enacted. In the absence of congressional action, the courts are not free to manufacture an exception to the clear mandate of the Act.

B. THE STATUTE IS NOT LIMITED TO PERSONS CONNECTED WITH ORGANIZED CRIME OR A LOTTERY ENTERPRISE

Congress defined the persons covered by Section 1953 in comprehensive terms: "Whoever, except a common carrier in the usual course of its business." This language plainly includes every person, not a common carrier, who transports the prohibited paraphernalia; it cannot be confined to persons affiliated with organized crime or organized gambling. Indeed, a specific provision limiting the Act's application to professional criminals or members of gambling syndicates would have created grave practical and contitutional problems. See *Lanzetta* v. *New Jersey*, 306 U.S. 451 (invalidating statute applicable only to "gangsters").

[11] This exception applies only to wagers "placed with the State agency conducting such sweepstakes * * * or with its authorized employees or agents." Thus, under the proof we expect to adduce in this case (see *infra*, pp. 18–19), this tax exemption would probably not apply to the persons for whom appellee purchased sweepstakes tickets.

It is significant that Congress limited the application of 18 U.S.C. 1084—enacted with Section 1953 as part of a single legislative "package"—to persons "engaged in the business of wagering." The inclusion of this limitation in a companion statute underscores the purposeful omission of any such restriction in Section 1953. Moreover, the specific exemptions for the carriage of parimutuel tickets and newspapers, provided in Section 1953 itself, clearly indicate the general applicability of the Act. For if only persons affiliated with organized crime or a gambling enterprise were included, there would have been little, if any, need for these exceptions.

We do not doubt that, in enacting Section 1953 and the related anti-gambling statutes, Congress was primarily motivated by a desire to suppress organized crime. But the reach of a statute often goes beyond the immediate evil which prompted its enactment. See, *e.g., Caminetti* v. *United States,* 242 U.S. 470 (rejecting the interpretation that the Mann Act is limited to "commercialized vice"). Moreover, the legislative history of the Act affirmatively shows that it was intended not only to combat organized crime, but to strengthen existing federal legislation closing the channels of interstate commerce to lottery paraphernalia.[12] See *supra,* pp. 6–7, 11–13; *infra,* pp. 17–18.

[12] The Attorney General's comment with reference to the companion measure forbidding the interstate transmission of wagers is instructive (House Hearings, p. 26): "It cannot be overemphasized that this bill is designed first, to assist the States and territories in the enforcement of their laws pertaining to gambling and like offenses. Second, the bill

C. "ACKNOWLEDGEMENTS OF PURCHASE," AS WELL AS ACTUAL LOTTERY TICKETS, ARE COVERED BY THE STATUTE

Appellee argued in the court below that the acknowledgements of purchase which he carried from New Hampshire to New York were not covered by the Act because they were not lottery tickets and did not have to be presented in order to collect the sweepstakes prize.[12] The statute, however, covers not only lottery tickets but "any record, paraphernalia, ticket, certificate bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in * * * wagering pools with respect to a sporting event." And the statutory prohibition is not limited to papers which are essential to a lottery operation; transportation of any papers which have a use in that operation and facilitate wagering is prohibited by Section 1953.

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would in that regard help suppress 'organized' gambling * * *." Note also the statement of the chairman of the House Judiciary Committee, upon opening debate on Section 1953 on the floor of the House, that "[t]he primary purpose is to prevent the transportation in interstate commerce of wagering material." 107 Cong. Rec. 16537.

[12] The purchaser of a New Hampshire lottery ticket writes a name and address, not necessarily his own, on the "ticket," which is held in a specially designed machine. When the sale is consummated, the "ticket" is retained in the machine and the "acknowledgement," bearing a copy of the name and address shown on the ticket, is ejected. The tickets remain in the State. After the drawing, the person whose name appears on each selected ticket is notified by telegram. After the sweepstakes race, the prize money is deposited in a New Hampshire bank to the credit of those named on the winning tickets, and the winners are thereafter paid through normal banking channels. New Hampshire Sweepstakes Commission, *New Hampshire Sweepstakes Program* 5, 7–8 (1965).

Congress purposely used broad language in describing the proscribed wagering materials to obviate the restrictive interpretation which the courts had placed on less comprehensive terms in previous anti-lottery measures. Two decisions in particular severely limited the scope of the statute forbidding the interstate transportation of "any paper, certificate, or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery * * *." Act of March 2, 1895, ch. 191, 28 Stat. 963. In *France* v. *United States*, 164 U.S. 676, 682, the Court held that the Act applied only to papers representing "an existing chance or interest which is dependent upon the event of a future drawing of the lottery."[14] In *Francis* v. *United States*, 188 U.S. 375, the Court held the statute inapplicable to the original betting slips retained by the lottery for accounting purposes. These, unlike the duplicate slips retained by the bettor, did not represent the bettor's interest in the lottery and were not the means by which he made good his claim to a prize.

Supporters of the broad language in Section 1953 made pointed reference to these and other restrictive interpretations of the existing statute, stating that "[t]he proposed statute is designed to close the most important loopholes resulting from the above decisions." House Hearings, p. 30; Senate Hearings, p. 9 (statements of Attorney General Kennedy). Assistant Attorney General Miller argued against the adoption of S. 527, which would have forbidden only the

[14] See also *United States* v. *Halseth*, 342 U.S. 277.

interstate transportation of "records or paraphernalia" (Senate Hearings, pp. 291–292), and emphasized the need "to declare the legislative goal with sufficiently inclusive language." House Hearings, p. 351. In enacting Section 1953, both Houses expressly accepted the Justice Department's view of the breadth of the statute. See H. Rep. No. 968, 87th Cong., 1st Sess., p. 2; 107 Cong. Rec. 13902.

Against this background there is no room for an argument that Congress intended to limit the statute to those papers which are an "integral and operative part" of the wagering operation.[15] It is immaterial that the acknowledgements, like the original betting slips in *Francis, supra,* did not represent the bettor's interest in the lottery or his means of obtaining a prize. It is sufficient that, as alleged in the present indictment, the papers were "to be used, and [were] adapted, devised and designed for use" in the sweepstakes. The question whether, in fact, the acknowledgements carried by appellee were so used, adapted or designed is not before this Court on this direct appeal. See *United States* v. *Petrillo,* 332 U.S. 1, 5; *United States* v. *Borden Co.,* 308 U.S. 188, 193. That is a question for the district court at trial. The government expects to prove that the acknowledgements were used to enable persons who remained in New York to bet on the sweepstakes through the agency of appellee, who was engaged in the business of purchasing the tickets for a fee, and that the acknowledge-

[15] Brief of the State of New Hampshire as *Amicus Curiae,* p. 3.

ments served to assure appellee's customers that tickets had in fact been purchased in their names. If this is shown, the trier of fact could assuredly find that the acknowledgements were used and adapted for use in a wagering pool.[16]

To exclude acknowledgements of purchase from the comprehensive prohibitions of the Act would run counter to the congressional purpose to close the channels of interstate commerce to wagering material and prevent interference with State anti-gambling policies. Although the lottery in question is legal in New Hampshire,[17] papers such as the acknowledgements carried by appellee, if freely transportable, can be used to thwart the laws of other States. In New York, the State to which appellee was charged with carrying the papers in question, the State constitution prohibits lotteries and the sale of lottery tickets. N.Y. Const., Art. I, § 9. By statute, New York prohibits the transfer of any paper purporting to represent an interest in a lottery "to be drawn within or without" the State, regardless of whether the lottery is "authorized or not by the laws of the state where

[16] Appellee did not contend below that the New Hampshire Sweepstakes is not a "wagering [pool] with respect to a sporting event," and it is clear that sweepstakes operations were intended to be covered by the Act. See House Hearings, p. 352.

[17] Appellee's alleged activities, however, would no longer be permissible in that State. Since the bringing of this indictment, the purchase of tickets for a fee on behalf of others has been made a misdemeanor. N.H. Rev. Stat. Ann. § 284: 21–o. It should be noted that the effectiveness of this statute may be limited since, by the time a violation by a person from out of State is discovered, the violator would probably be beyond the reach of New Hampshire authorities.

[it is] drawn or to be drawn." N.Y. Penal Law §§ 1373, 1382. See also N.Y. Penal Law §§ 975, 1370, 1371.[18] The decision below permits the use of the acknowledgements in such a manner as to undermine New York's policy, expressed in those enactments. This is just what the federal statute, by its comprehensive terms, was designed to prevent.

[18] The statement in the government's bill of particulars that appellee was not charged with any State-law violation does not suggest the contrary. It merely indicates that the only charge appellee was called upon to meet was one arising under federal law. The government's memorandum in response to appellee's motion to dismiss, which noted that "[a] lottery is not legal in New York State," properly pointed out that "it is not necessary to find the defendant in violation of any State Law before there is a violation of" Section 1953 and that "State Law is relevant * * * only with respect to the exceptions in subdivision (b)." Of course, the indictment need not allege that a statutory exception was inapplicable. See *McKelvey* v. *United States*, 260 U.S. 353, 357; *Edwards* v. *United States*, 312 U.S. 473, 482–483. In any event, the bill of particulars filed in this case could not affect the sufficiency of this indictment. See *United States* v. *Comyns*, 248 U.S. 349, 353; *Dunlop* v. *United States*, 165 U.S. 486, 491.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should reverse the judgment below and reinstate the indictment.

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